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No. [redacted] 303

IN THE

# Supreme Court of the United States

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WILL F. THOMAS, SHERIFF AND COLLECTOR ET AL., APPELLANTS,

VS.

KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL., APPELLEES.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

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## BRIEF FOR APPELLANTS.

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No. 807.

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WILL F. THOMAS, SHERIFF AND COLLECTOR ET AL., APPELLANTS,

VS.

KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

## BRIEF FOR APPELLANTS.

Little River Drainage and Levee District of Sevier County No. 1 was created by Act 186, page 747 of the Acts of the Legislature of Arkansas of 1915, and the individual appellants were, by the terms of said Act, named as directors of said district; as then constituted, the district embraced about twenty-eight thousand acres of land. By Act 79 of the Acts of 1917, page 348, the original Act was so amended as to eliminate from the

east side of the district a large portion of the lands originally embraced therein, fixing new boundaries and leaving in the district about twelve thousand acres.

The purpose of the district was, by a system of levees and drains, to reclaim all of the swamp lands of the district and to protect all lands, including the roadbed and right of way of the railroad from periodical overflows by Little River. Only ten per cent of the lands in the district was susceptible of cultivation without drains and levees.

Through the western side of the district ran the railroad owned by the Texarkana and Ft. Smith and operated by the Kansas City Southern Railway and by the tentative plans adopted by the commissioners, the levee was to be built on the western line of the district, thus protecting said railway from overflow from the waters of Little River which, in times of high water, submerged it and the lands in the district. By the Act the directors were ordered to have surveys made and adopt plans and specifications for the improvements, and it was provided that said board should have the power to levy annually a tax upon the assessed valuation of the real property in the district, as it appeared each year upon the assessment books, not exceeding in any one year, the sum of six per cent on such assessed valuation, to defray the expenses of the improvement. The Act carried the usual clauses for the issuance of bonds and making of contracts. The sheriff and collector of Sevier County was directed to collect from the various property owners in the district the taxes

levied against the lands therein, at the time of the collection of the general state and county taxes.

After the passage of the Amendatory Act in 1917, the directors passed a resolution levying a tax upon all of the real property in accordance with the assessment thereof, of six per cent of the assessed valuation thereof, pursuant to the provisions of the Act, and the collector of Sevier County, Will F. Thomas, was proceeding to collect such taxes, so levied, when the appellees filed their bill in the District Court of the United States for the Western District of Arkansas, Texarkana Division, seeking to enjoin the collection thereof, upon the grounds, among others, that the taxes were confiscatory and deprived appellees of their property without due process of law, contrary to Section One of the Fourteenth Amendment to the Constitution of the United States. Issue was joined by answer denying the allegations of the complaint and alleging that the railroad was benefited by the improvement; that the legislative acts creating the district were valid, and that the taxes levied were proper.

A temporary restraining order was issued and on a trial on the merits the district judge found that the basis of assessment was fixed by the Legislature and the benefits by it determined; that indirect benefits would accrue to the railroad company by reason of probable increased traffic (R. 17). The court also held that the assessments against the property of the appellees included their franchise (personal property) and that by reason thereof, appellees were deprived of their property

without due process of law, contrary to Section One of the Fourteenth Amendment (R. 18).

From the decree of the district judge, an appeal was taken to the Circuit Court of Appeals which resulted in a judgment affirming the decree of the lower court, but on different grounds (see Opinion, 277 Federal, 708) (R. 158). The Circuit Court of Appeals held that the judgment of the lower court was based upon an erroneous ground, in that it followed and applied the law as determined by said Circuit Court of Appeals in *Bush* v. *Branson*, 248 Federal, 377, to the effect that the franchises of the railroad were included in the assessment and hence both personal and real property of the appellees were taxed while only the real property of the other owners were taxed and, in the opinion, said that the lower court had correctly construed the law as applied by the Circuit Court of Appeals, but that this case had been reversed by the Supreme Court (251 U. S. 182), and, therefore, the ground upon which the court based its decree was untenable.

The Circuit Court of Appeals determined every issue for the appellants, save and except that the assessment of benefits is unjust, arbitrary, illegal and void, and held that the case revealed an instance of discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law and affirmed the decree of the lower court upon that ground (R. 158-162). From that decree, this appeal is now prosecuted.

Since there was no cross appeal by the appellees, either from the decree rendered by the District Court or

that rendered by the Circuit Court of Appeals, practically the only legal question involved is whether the facts do reveal an instance of discrimination so palpable and arbitrary as to amount to a denial to the appellees of the equal protection of the law.

## ASSIGNMENT OF ERRORS.

Of the assignments of error, the appellants rely upon the following, to-wit:

(1) That the Circuit Court of Appeals erred in holding that, included in the assessment of the railroads was the intangible value of said roads, and that a higher rate of taxation was imposed upon the railroad than on other property in the district.

(2) That the property of the railroad would be taxed to the extent of half of the amount of the cost of the improvement.

(3) That there was no direct benefit to the property of the appellees from the construction of the improvement.

(4) That, as applied to the railroad property of appellees, the tax levied was so palpable and arbitrary as to deny appellees the equal protection of the law (R 164).

### Acts Creating the District.

Those portions of the Acts creating this district which are pertinent to the issues are as follows:

By Section Four of the Acts of 1915, it is provided:

> "The board of directors of the Little River Drainage and Levee District of Sevier County shall have power, and it is hereby made its duty to assess and levy annually a tax upon the valuation as it shall appear each year upon the assessment books

of Sevier County, Arkansas, upon all lands and tramroads and on natural gas and pipe lines, telephone and telegraph lines and upon the railroad tracks of companies in said district, as appraised by the board of railroad commissioners, or their successors, not to exceed, however, in any one year, the sum of six per cent of the assessed valuation of said property within the district."

Section Twelve of the Amendatory Act of 1917, is, in so far as pertinent, as follows:

"The tax collector of Sevier County, Arkansas, shall be and act as collector of levee taxes of the said district. He shall be notified each year by the secretary of the board the per cent that is to be collected that year as drainage and levee taxes of the assessed valuation of the lands * * * railroads * * * or other property taxable by said drainage and levee district. The said collector shall proceed to collect such drainage and levee tax at the same time and place as provided by (law) for the collection of state and county taxes * * * and if he shall fail to collect the drainage and levee taxes along with the other taxes, he shall be subject to a penalty of fifty dollars for each instance in which he shall collect from an individual firm or corporation the other taxes and willfully or wrongfully omit to collect said levee and drainage taxes * * *; and the secretary of said board shall make out and furnish to said collector each year a book or books in which shall be listed the lands * * * railroads * * * and other property in the drainage and levee district, and in separate columns opposite the lands * * * railroads * * * and other property shall be placed the names of the supposed owners, the amount of the levee and drainage taxes to be collected that year."

"All taxes levied under the terms of this Act

> shall be payable between the first Monday in January and the tenth day of April of each year * * *."

In its decree (R. 17), the District Court found that appellees' property would be benefited by increased traffic resulting from the improvement, but that no direct benefits would accrue to their property; that the assessment against their property included appellees' franchises and that by reason thereof the assessment deprived appellees of their property without due process of law, and (following *Bush* v. *Branson*, 248 Federal, 377, later reversed by this court, 251 U. S. 182), granted a perpetual injunction against the collection of said assessment. The district appealed but there was no cross appeal by appellees. In the Circuit Court of Appeals it will be seen by reference to the opinion (R. 158-162) that said court held the basis for the decree of the lower court was insufficient because of the reversal by this court of the Bush-Branson case, upon which the decision was bottomed.

The Court of Appeals agreed with the lower court in holding that indirect benefits resulted to the railroad by the improvement, but held that the cost and expense thereof, although increasing the value of the acreage property a quarter of a million dollars, would be paid, half by appellees and half by the acreage, while the benefit to appellees by reason only of increase in traffic was problematical and, hence, the case revealed an instance of discrimination so arbitrary as to deny appellees the equal protection of the law.

## Questions Arising Upon the Record.

Since there is no cross appeal here and none from the decree of the District Court, the questions arising may be stated as follows:

(1) Was there any direct benefit to the railroad by reason of the contemplated improvement?

(2) Conceding there were no direct benefits to the railroads, but that their property was indirectly benefited, was it subject to taxation?

(3) Would the railroads be required to pay half the cost of the improvement as found by the Court of Appeals?

(4) Did the assessment, as made, deny to the appellees the equal protection of the law?

## Benefits.

Since the District Court found indirect benefits resulting to the property of appellees by increased traffic and that finding was affirmed by the Circuit Court of Appeals, there remains in question, with reference to benefits, only whether appellees' property received direct benefits. Appellants contend that the record discloses substantial direct benefits would have resulted to appellees from the improvements. It should be remembered that the district was created by legislative act, which implies a determination that all of the real property in the district was equally benefited in accordance with the valuation of said property as assessed for state and county purposes. This legislative determination of benefits may not be inquired into for mere error of judg-

ment, and can be defeated only upon the ground that it is arbitrary, unjust and unreasonable and made without regard to benefits; demonstrable mistake on the part of the Legislature must be shown.

Turning then to the evidence on the part of the railroads, it will be seen that none of its witnesses were familiar with the improvements contemplated, the extent of the district, the drains and levees proposed to be constructed, nor the effect that the improvements would have upon the water from Little River, which, without the improvements, would flow against and under the railway tracks.

There was a trestle 500 feet long in the district at Neal Springs which had been washed out by an overflow of Little River in 1915 and several bents thereof washed away, thereby entailing on the railroads expensive delays and reconstruction. This trestle, save and except a small portion necessary for surface drainage, appellants contend could be eliminated by the construction of the proposed improvements and, thereby, the railroads could have substituted therefor an earthen dump which was more safe and less expensive to maintain.

To sustain their contention, appellees introduced their tax commissioner, D. Phelps, who did not claim to be an engineer nor an expert in drainage and levee protection; Phelps testified that the road would not be benefited (R. 27). He admitted that he had no knowledge of engineering and did not even know that the trestle at Neal Springs had washed out in the overflow

of 1915 (R. 34). That in his judgment only railroad officials should be allowed to say what improvements would benefit the road (R. 35). That trestles were maintained by railroads not from choice but from necessity (R. 36-7).

The division engineer for the railroads testified:

That the track of the railroads in the district had never overflowed to his knowledge, and that he had never seen the water so high that it ran under (over) the trestle at Neal Springs, and that he did not know whether the water went over the railroad in 1915 (R. 39-40). That he did not know whether the rails were above high water (R. 39-40).

J. M. Weir, chief engineer, testified:

That the improvements, in his judgment, would not be beneficial and might be detrimental; that he did not know where the levee was to be built; that speaking generally, a trestle was more expensive to maintain than an embankment; that with a levee of sufficient height, you could possibly cut out that trestle but would have to increase the opening at the river. That he had never figured whether the main channel at the bridge was sufficient to carry off all the water, but knew from the records of the company the opening at the river was pretty well occupied. That he did not see why a levee would result in benefit and assuming a levee sufficiently high to keep off the water, there would be a benefit to that extent; that he did not know the trestle had been washed out, but understood there was a slight washing in 1915, and knew that there was some delay to traffic; that de-

layed traffic meant expense to the railroad. That he knew nothing of the district east of the road and had made no survey of the vicinity (R. 52-53).

The manager for appellees stated he had been with the roads since 1906. That the road bed in the district did not overflow in 1915, and the water then was three and one-half feet higher than it had been known (R. 55). That the opening (trestle referred to) was an old channel of the river and was left to take care of overflow water; that it could be closed, but would not be advisable from an engineering standpoint, and if closed the main channel at the river was not sufficient to take care of the water. That it would cost $2700.00 to fill in this trestle; that the improvements would, in his judgment, be no benefit, as the embankment is old, well settled and above high water (R. 56-57). That three bents of the trestle were lost in the overflow in 1915 and caused expense of repair and delay of about thirty hours (R. 60); that this delay held up the usual trains, more than half a dozen. That he did not know the elevation of the ground at the east part of the district (R. 60); that, in general, a dump is cheaper than a trestle and the element of safety is a good deal in favor of the embankment (R. 62). That it is more expensive to maintain the trestle than the rest of the track, figuring replacement, and that if a levee were built of sufficient height to keep off the water, this would be a distinct benefit, but he did not think it good engineering, as the opening was required under the present conditions and, to close that opening, would require another at some

other place. That he does not know whether the closing of this trestle would raise the water level at the river (R. 62-63). That he would not close this trestle if the levee were six feet above high water mark for the levee might break (R. 65). The witness then figured that the difference in cost of the maintenance of a trestle and a dump (including however the cost of the trestle itself since it is there), would be one hundred and thirty-nine dollars per annum in favor of the embankment (R. 136-137).

F. C. Peck, a contractor, testified:

That he had been acquainted with the road for twenty years at Neal Springs and that he did not think it would receive any benefits from the improvement; that he did not know the height of the proposed levee (R. 67-68). That if we had another overflow like 1915 the trestle would probably go out again (R. 68).

J. J. Taylor, appellees' superintendent of bridges and building said that although four bents of the trestle went out in 1915 the railroad would receive no benefit; that the levee would not obviate the necessity of a trestle, for it would be dangerous, if the levee should break, and additional opening would be required (R. 69). That he was not an engineer and had not been over the district; it is less expensive to maintain a dump than a trestle and the element of safety is in favor of the dump and if the trestle could be eliminated the railroads would be benefited and if a good levee were built the only question would be whether the opening at the bridge would take care of the water, and he thought the opening insufficient (R. 73).

J. J. Hancock, road master for appellees said the road was in good condition; that three bents of the trestle (in the district) went out in 1915; that the road did not need drains or ditches and would receive no benefits (R. 76-77). That with a levee sufficient to keep out the water there would be some benefit. That the cost of upkeep as between the trestle and dump, after construction and after the ground set, would be less. That he did not know what drains or levees were proposed to be built (R. 78-79).

C. S. Christian, engineer for the district, said that for twelve years he had been engaged in levee and drainage work, having been connected with various projects, among others the St. Francis Drainage and Levee District, a drainage district in Missouri, covering three hundred thousand acres, Miller Levee District No. 2, Bowie Levee District No. 1, Red River Levee District No. 1, Lost Prairie Levee District and other (R. 106-108); that he caused a survey to be made and levels taken of the district (R. 109-112). Witness then gave the various levels of the district and stated that the bridge of appellees at Little River would carry the increased flow of water with a levee built as proposed and with the trestle at Neal Springs closed (R. 115); that the proposed levee would be two feet higher than the overflow of 1915 (R. 117); that to build the levee on the east side of the railroad would necessitate crossing three sloughs and going over low land which would be very expensive; the cost of building on the west side was five thousand dollars against twenty thousand on

the east side (R. 120-121). That the construction of the improvements would result in benefit to the railroads in increased tonnage, in better health conditions and to some extent save the cost of upkeep, for the roads could close the trestle or shorten it very materially and thus reduce the cost of maintenance (R. 118). That to replace the trestle at Neal Springs would cost twenty-five dollars a foot and that to fill in the trestle with dirt would cost about five thousand dollars (R. 131).

E. W. Beeson, one of the appellants testified:

That appellees line of road was the only one serving this district; that the lands are worth little without the levee; that if a levee were built they would be as good as the best, and ninety per cent with drainage would make good corn and cotton; with the improvements all these lands would be cleared and put in cultivation. The crops in this vicinity were marketed over appellees' lines; that the improvements would benefit the health of the community (R. 84-86). That lands in cultivation are worth fifty dollars per acre and with drainage would be worth one hundred dollars; unimproved the lands are not selling for more than eight to ten dollars, but would be more than doubled in value with the improvements; the improved lands are assessed at from ten to fifteen dollars an acre, while the unimproved range from two and a half to six dollars per acre (R. 86-87).

G. B. Pride, a merchant at Horatio for many years, stated that all incoming and outgoing freight in this vicinity came and went over the lines of appellees; that the improvements would result in additional tonnage go-

ing in and out of the vicinity, and the railroads would receive this benefit (R. 93-95).

Joe Greer, a farmer, testified:

That the lands would produce a bale of cotton and sixty-five bushels of corn per acre; that the crops were shipped out over the line of appellees road; lands in cultivation in the district are worth one hundred dollars, while those not in cultivation are worth from thirteen to forty dollars; and with drainage their value would be doubled (R. 99-100).

G. A. Henry, one of appellants, testified:

That the cultivated lands in the district formed only ten per cent of the area; these lands are merely patches drained by sloughs; that outside of these patches the lands cannot be cultivated on account of overflow. The overflow of 1915 destroyed the crops on the patches referred to; with levees and drains the lands would bring three-fourths of a bale of cotton and fifty bushels of corn on an average per acre, and if thus protected these lands would be put in cultivation (R. 101-102).

W. W. Millwee, testified:

That there are about twelve thousand acres in cultivation and eleven thousand acres of wild, or unimproved, land in the district (R. 81).

The proof of the railroad is clearly insufficient to overturn the finding of the Legislature that direct benefits result to it and falls far short of showing either arbitrary action or demonstrable mistake. In the early days of improvement legislation the Arkansas Court

adopted the following rule from 2 Cooley on Taxation, third edition, page 1207-8:

> "It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits and defeated by satisfying a court that no special and peculiar benefits are received. If the Legislature has fixed the district and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must, in general, be deemed to be conclusive No doubt there may be exceptions."

*Lennon* v. *Brady*, 81 Ark. 208.

To the same effect see *Railway Company* v. *Grayson*, 72 Ark. 127.

> "The action of a city council in including property in an improvement district is conclusive of the fact that it is adjoining the property to be affected, except when attacked for fraud or demonstrable mistake."
>
> *Little Rock* v. *Katzenstein*, 52 Ark. 107.
>
> "But such fraud or demonstrable mistake can occur only when the assessments are levied on land entirely regardless of the benefits and by reason of a manifest prejudice against the owner, or in a total reckless disregard for his rights. If the property is benefited to any extent by the improvement, then it can be included in the district; and the mere fact that the benefits assessed against it are exorbitant or excessive, would not invalidate assessments thereon." *Board* v. *Pollard*, 98 Ark. 550.

In *Board* v. *Offenhauser*, 82 Ark. 268, the court said:

"It has been repeatedly decided that the legislative act of assigning district for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying a court that no special and peculiar benefits are received."

"The legislative determination should be, and is, conclusive unless it is arbitrary and without any foundation in justice and reason," *L. & A. Ry. Co. v. State*, 85 Ark. 12.

In *St. Louis, Iron Mountain and Southern Railway Company v. Board*, 103 Ark. 134, the court held:

"After a Legislature has determined that a certain area * * * will be benefited by the improvement, it is not a question for the courts to determine upon a *preponderance of the evidence* as to whether or not the legislative judgment has been properly exercised. It is only an arbitrary and manifest abuse of the power of the Legislature in creating improvement districts that will be reviewed by the court."

The Arkansas court in *Fellows v. McHaney*, 113 Ark. 370, said:

"The Legislature ascertained and declared that the assessment previously made was a proper one * * * and its action in so doing is beyond judicial review in the absence of a showing that the assessment so validated was arbitrarily made regardless of benefits or without a showing that no benefit could possibly accrue from the improvement sought to be made." * * *

"By this Act of 1913 the Legislature ascertained and declared that the assessment previously made was a proper one and validated it, and its action in so doing is beyond judicial review, in the absence of a showing that the assessment, so validated was

arbitrarily made regardless of benefits, or without a showing that no benefit could possibly accrue from the improvement sought to be made to the property sought to be taxed."

In a case where the court held that the benefits were anticipated and estimated in advance and that if said benefits did not accrue, still the land was required to pay in proportion to the benefits fixed by the Legislature, it was said:

> "Mere mistakes of the law-makers, or of those empowered by the law-makers to make assessments, in fixing the amount or rate of assessment, will not be reviewed and corrected by the court. There is no merit in the contention that the appellant's lands cannot be taxed because the levee was not properly constructed, or because it has caved away, so that it no longer affords protection from overflows. The anticipated benefits were estimated in advance and the assessments were levied accordingly and the fact that the benefits have not been fully realized affords no avenue of escape from payment of assessments to defray the cost of the improvements." *Salmon* v. *Board of Directors*, 100 Ark. 369.

The Arkansas court again had under consideration this proposition in a railroad case and there said:

> "It has been held that the amount of the benefits which such officials have found and determined to accrue to each lot and parcel of property in a district by reason of the improvement will be presumed to be correct and just and the courts will not disturb same until the contrary has been shown by the evidence. Such evidence must consist not *merely of opinions that the assessments are excessive*, but of facts which will overturn the *prima facie* fairness and equality of the assessment estab-

lished by the returns of the assessors," *Improvement District* v. *Railroad*, 99 Ark. 521.

The same proposition was affirmed by the Arkansas court in a later case in the following language:

> "It being a controverted question of fact, with sufficient evidence to show that appellants' property was benefited, the conclusion of the Legislature to that effect must stand."

Ry Co vs Board 103 Ark 134

Again the Arkansas court laid down the same rule in the following language:

> "Mere mistakes of the law-makers or of those impowered by the law-makers to make assessments, in fixing the amount or rate of assessments, will not be reviewed and corrected by the court," *Board of Directors* v. *Crawford Co. Bank*, 108 Ark. 422.

The same proposition was announced in another case as follows:

> "We have decided in numerous cases that a legislative ascertainment that benefits from a local improvement accrue in proportion to the value of the property benefited will be respected unless it be demonstrated to a certainty that a mistake has been made," *Board* v. *Gas Company*, 110 Ark. 121.

The Supreme Court of the United States has often recognized and applied the principles announced by the Arkansas court in the above cases, and in an irrigation case, it was held as follows:

> "The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other

or further hearing upon that question." *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 155.

To the same effect see the following cases:

*Webster* v. *Fargo*, 181 U. S. 394.

*L. & N. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 434.

*Spencer* v. *Merchant*, 125 U. S. 345.

*Webster* v. *City of Fargo*, 181 U. S. 394.

Under the record, it is evident that the testimony of the railroad fails to approach that degree of certainty required to overturn the legislative finding of benefit. The witnesses for the railroad were not levee or drainage engineers; while one or two were engineers, yet, they had not taken any levels and had no means of determining whether the proposed levee when constructed would be sufficient to prevent overflows by Little River. Practically all of the witnesses for the railroad agreed that an embankment is much safer than a trestle; that, in the event the levee would protect the railroad from the overflow waters of Little River, direct benefits would follow; some intimated that the bridge over Little River was insufficient to take care of the increased water, but all admitted they had not made any survey or calculations to determine that question.

On the other hand, the district starts out with a legislative determination of benefits; we know that Little River in 1915 washed out three bents of the trestle in the district. We know that the levee west of the railroad was to be built two feet above the 1915 overflow, the highest ever known. The engineer for the district, a man experienced in drainage and levee work, after a

survey, testified that the railroad company could eliminate this long five hundred foot trestle, except a small portion necessary for surface drainage and that the railroad would be benefited by diminished upkeep, increased traffic, and by better health conditions; he was familiar with every foot of the ground and with the plans for the improvement, while the engineers of the railroad were unfamiliar with the district, and its plans and had made no survey but expressed their judgment that no benefit would accrue merely because they did not deem it good railroading to eliminate the trestle, since the levee might break. With as much assurance, the farmers protected by the stupendous system of levees along the Mississippi River could contend that they were not benefited as the levees might break and their lands might be damaged; yet, in the evidence, the only foundation for this contention is the conjecture that there might be a breach in the levee.

We, therefore, submit, a finding that no direct benefit would accrue to the railroad is merely a substitution of the judgment of the court for that of the legislature; that it is nothing short of a determination of that fact upon conflicting testimony and that too, when the testimony for the district was based upon actual survey and full knowledge of the plans, by a man experienced in levee and drainage work, while that of the railroad is purely the conjecture of men without knowledge by survey or otherwise of the conditions or of the location or extent of the improvement. Unless the rule of law enunciated both by the Arkansas court and this

court in the many decisions referred to, to the effect that on conflicting testimony arbitrary action or demonstrable mistake of the legislature will not be inferred, and that, in general, the finding of the legislature as to benefits is conclusive, be wholly disregarded, we feel that the court must be constrained to hold that direct benefits would result to appellees' property.

**Assessments not Discriminatory.**

The Circuit Court of Appeals has held that while the acreage property would be benefited to the extent of a quarter of a million dollars, and would only be required to pay half the cost, yet the property of appellees, which was benefited only by problematical increase of traffic, would bear the other half. We respectfully submit that, in this conclusion, the court fell into an egregious error, a demonstrable mistake. The testimony on the part of E. W. Beeson (R. 84-87), G. B. Pride (R. 93-95), Joe Greer (R. 99-100), and G. A. Henry (R. 101-102), it is true, shows that the value of the acreage property would be more than doubled; and that the lands were worth unimproved from eight to twelve dollars per acre, yet, with the improvements, the lands would be worth from fifty to one hundred dollars; that the cultivated lands (which are mere patches) are assessed at from ten to fifteen dollars per acre, while the assessment on the unimproved lands ranges from two and a half to six dollars.

It is true that approximately one-half of the tax under the present levy and under present conditions

would be paid by the roads, but that condition would not long prevail and the court evidently failed to consider this pertinent fact. The legislature evidently assumed this large and fertile area of sloughs and swamps, habited now only by reptiles and frogs, would be quickly transformed into fallow fields of yellow corn and whitening cotton, and would increase in valuation as the land was put in cultivation and that thus, the burden of taxes would be removed from the railroad and placed upon the acreage property.

D. Phelps, tax commissioner for appellees in his testimony (R. 31-32) shows that railroad and other real property is assessed for taxation for state and county purposes at one-half of its real value. The testimony for the district shows that all of these lands would be put into cultivation as soon as the improvements were made, and that lands now assessed at from ten to fifteen dollars per acre, were cultivated and from two and a half to six dollars ~~were~~ where unimproved, would immediately become worth not less than fifty and probably one hundred dollars and, therefore, would necessarily be assessed at from twenty-five to fifty dollars per acre. Real estate in Arkansas is required to be assessed every two years. The statute, in so far as pertinent, is as follows:

> "The assessor shall, on or before the first day of December in each odd numbered year, file his report of assessment of real estate with the county clerk in books of the kind and character furnished him by the county clerk for the purpose of assessing such real estate * * *" Crawford & Moses' Digest, Section 9921.

Therefore, when these lands are levied and drained the twelve thousand acres would be worth at least $600,000.00 and on a fifty per cent basis, would be assessed at $300,000.00, while the railroad assessment would vary little, if any, from its present amount, $69,-910.00 (R. 31). With the improvements, these lands will be opened and cultivated and instead of the railroad paying half of the taxes it would only pay approximately one-fifth thereof, assuming the minimum value, as shown by the proof of the lands when improved; assuming the maximum value of one hundred dollars per acre, then the railroad would be paying only one-tenth of the taxes.

We, therefore, respectfully submit that the Circuit Court of Appeals failed to take into consideration conditions as they will be when the improvements are made and hence fell into the error of holding that the railroad would be required to pay one-half of the taxes.

## Due Process of Law.

The Circuit Court of Appeals held, on the erroneous premise that, since the railroad would pay half the cost of the improvement, while the acreage property which was benefited to the extent of a quarter of a million dollars would pay the remainder, this was a taking of their property without due process of law. We think the court erred in holding that the only benefits to the railroad were from increased traffic; but, assuming that the increased traffic was the only benefit and that the railroads made such a *prima facie* case as to overturn the

findings by the legislature of direct benefits, yet, we feel that the court misconceived the purport of the decisions, both of the state court and this court, as to the effect of mere errors or inequalities in assessments. We assert that where the assessment has been made by the legislature it may not be overturned by reason of inequalities, for no scheme may be found whereby exact justice can be done in assessments. Moreover, we think it clear, that the 14th amendment may not be used as a cloak to overturn the ordinary and general tax policies of the states.

In the early case of *Railway Company* v. *Grayson*, 72 Ark. 120, the Arkansas court, quoting *Spencer* v. *Merchant*, 125 U. S. 345, laid down the proposition of law, which we contend should be here applied, as follows:

> "The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so; and may settle both questions for itself, and when it does so, its action is necessarily conclusive and beyond review. * * * No hearing would open the discretion of the legislature or be of any avail to review or change it. * * * The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers."

In an Arkansas case, where the railroad contended that since its track was already above overflow it would receive no benefit from the building of a levee and produced proof to sustain its contention, the court said:

"It is not necessary that it should receive absolute protection from overflow, or that it should have been entirely without protection and subject to inundation before the levee was built. *Whether it was benefited to an extent equal to that of other property in the district, we do not consider it necessary to determine.* That was a matter largely for legislative determination in fixing the boundaries of the district and providing for the method of assessment of taxes. That it was a matter for legislative inquiry and determination, and that the courts must respect such determination is settled, so far as it can be done by the decision of this court, in the case of *Railway Company* v. *Grayson*, 72 Ark. 119, and that decision is in accordance with the authorities generally," *Railway Company* v. *Board of Directors*, 81 Ark. 562-565.

A district was created in Jackson County, Arkansas, which included the right of way of a railroad; the railroad claimed not only that it received no benefits, but that its roadbed was damaged by the improvement and introduced its engineers, as experts, to show the damage; the court held:

"After the legislature has determined that a certain area which it has organized into an imimprovement district will be benefited by the improvement, it is not a question for the courts to determine under a preponderance of the evidence, as to whether or not the legislative judgment has been properly exercised. It is only an arbitrary and manifest abuse of power of the legislature in creating a district that will be reviewed by the courts." *Ry. Co.* v. *Board of Directors*, 103 Ark. 134.

The legislature created a bridge district to erect a bridge over the Arkansas River between Ft. Smith and Van Buren. The Frisco Railroad owned the only bridge across the river; it attacked the district on the ground that the bridge would be a detriment, in that traffic would be diverted from its railroad; it was shown that the earnings in freight traffic had decreased since the bridge went into operation, but the court held that this might have been due to poor crops; that future benefits are speculative and that the growth of population might be expected to increase the traffic; that no exact standard of benefits could be found and since there was some evidence of benefits, the assessment must be upheld. The court said:

> "The assessment of future benefits is largely a matter of estimate and, to some extent speculative. As was stated by Mr. Justice Holmes in the case of *Louisville & Nashville Ry. Co.* v. *Barber Asphalt Co.*, 197 U. S. 430, 'the amount of benefit which an improvement will confer upon particular land, and indeed, whether it is a benefit at all, is a matter of forecast and estimate, and on the question of benefits, the present use is simply a prognostic and plea of prophecy' * * *. If it were necessary to find an exact standard, a measure of benefits in advance would be impossible." *St. Louis & S. F. Ry. Co.* v. *Bridge District*, 113 Ark. 496.

In *St. Louis & S. W. Ry. Co.* v. *Grayson*, 72 Ark. 120, the act creating the district was so drawn as to include the track and roadbed of the railroad, but no lands to the east of the track were included; the railroad

claimed that its track would not be benefited as it was on the eastern boundary of the district and that the act deprived it of its property without due process of law; the Arkansas court held, however (and it is directly in point here) that, since the legislature had fixed the district and levied the taxes, its action must be deemed conclusive.

In *Alcorn* v. *Bliss-Cook Oak Company*, 133 Ark. 122, where the testimony was that the lands of the oak company did not derive as much benefit as other lands, the court held it unnecessary to consider the testimony on that point, and said:

> "It is impossible to foresee exactly how a proposed tax will fall. The object is that the burden should be distributed as nearly as may be in proportion to the benefits derived, and for that reason the legislature is entrusted with the entire control of the subject."

In another case in the Arkansas court where the testimony of the railroad employes was, as here, that no benefits would be received, the court, in upholding the assessment, said:

> "No attempt was made to prove fraudulent, or capricious or arbitrary action on the part of any officials in making the assessment, the only evidence upon the subject being the opinions of four employes of the company that the improvement of the road would not benefit the railroad property, and if inequality has resulted from the application of the state law in a customary manner to a situation frequently arising in our country, it is an incidental inequality resulting from a valid classification of railroad property for taxation purposes

which does not fall within the scope of the Fourteenth Amendment, which was not intended to compel the states to adopt an iron rule of equal taxation," *Mo. Pac. R'd Co.* v. *Conway County Br. Dist.*, 142 Ark. 14.

In another legislative district, organized to drain lands of back water, before the Arkansas court, the railroad and other property owners, contending that their lands were not benefited, the court said:

> "The statute very plainly constitutes a legislative determination that benefits will accrue in proportion to the valuation of the land in the district, and adopts the assessment made for purposes of county and state taxation as a basis of valuation. An annual tax not to exceed ten per centum of the assessed valuation is authorized. This is the method adopted by the board of directors. This court has decided that a legislative determination that benefits from a given improvement will accrue in proportion to valuation must be respected by the courts unless found to be arbitrary and demonstrably erroneous, and that such a method of arriving at the benefits from the improvement is valid. (Citing many cases.) That principle has often been recognized and applied by the Supreme Court of the United States in similar cases." (Citing *Webster* v. *Fargo*, 181 U. S. 394; *Railway Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 434; *Wagner* v. *Baltimore*, 239 U. S. 265; *Houck* v. *Little River Drainage District*, 239 U. S. 254; *Myles Salt Co.* v. *Board of Commissioners*, 239 U. S. 478.) The court then proceeded:
>
> "The determination of the legislature as to the method of assessment is not arbitrary or erroneous on its face, nor does the testimony in this case show that it is palpably wrong. There is considerable testimony tending to show that the lands

> of appellant lying near the southern end of the district will not be relieved from overflow to the extent of other lands in other portions of the district, but it does not necessarily follow that the methods of assessment are upon the wrong basis or that they are unequal," *Oates et al* v. *Cypress Creek Drainage District*, 135 Ark. 149-155.

Both the Oates case, cited above, and the case of *Ry. V. Bridge District*, 113 Ark. 496, are authority for the proposition that increase in traffic is a sufficient benefit to railroad property; and the Oates case is also authority for the proposition that, in drainage districts, the betterment in the health of the community is a proper element for consideration. Other cases have held likewise; as, *Oliver* v. *Monona County*, 90 N. W. 510; *Veals* v. *Inhabitants of Brookline*, 174 Mass. 1; *Donnelly* v. *Decker*, (Wis.) 17 N. W. 389; *Anderson* v. *Kerns Drainage Company*, 14 Ind. 199; *R. R. Co.* v. *Ketring*, (Ind.) 23 N. E. 527; *Hager* v. *Yolo County*, 47 Cal. 222; *Hagar* v. *Reclamation District No.* 108, 111 U. S. 701.

That the language of the 14th Amendment does not contemplate a system of delusive exactness is well settled by the decisions of this court and, as was said by the court in *L. & N. Ry. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 434:

> "It is important for this court to avoid extracting from the very general language of the 14th Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted, and which it is safe to say that no one then sup-

posed would be disturbed. * * *"

"Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected, seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things."

We quote the opinion of this court in *Bush* v. *Branson*, 251 U. S. 189, as follows:

"On the question of benefits which would come to the railroad company from the construction of the road, the appellee receiver called four witnesses, three of them engineers and one a superintendent of the company. Two of these were familiar with the location of the road and the other two testified that they knew of its location in a general way. All four testified in general terms that the road was not and never would be of any benefit to the railroad. It is significant that no traffic man was called, and that no evidence was introduced showing the extent of business done at Alma before and after the improvement of the road."

We quote *Cass Farm Company* v. *Detroit*, 181 U S. 395-398, as follows:

"We have recently held that it was not the intention of the 14th Amendment to subvert the systems of the states pertaining to general and special taxation; that amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life and property as is afforded by the 5th Amendment against similar legislation by Congress, and that the Federal courts ought not

to interfere when what is complained of is the enforcement of the settled laws of the states applicable to all persons in like circumstances and conditions, but only when there is some abuse of law amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood* v. *Baker.*"

*Tonawanda* v. *Lyon*, 181 U. S. 389.
*Spencer* v. *Merchant*, 125 U. S. 345.

This court said in *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 155:

* * * "Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received and that no land ought, in justice, to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, could it be that the adoption of an *ad valorem* method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. * * * The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law."

In *Hager* v. *Reclamation District*, 111 U. S. 701, it was said:

> "It (Legislature) may define the apportionment of the burden, and its action cannot be assailed under the 14th Amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions."

We quote *Houck* v. *Little River Drainage District*, 239 U. S. 260, as follows:

> "When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly; but even in such case there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The state in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners * * *. And, as we have said, unless the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property, it cannot be maintained that the state has exceeded its taxing power."

In a later case, this court has held that an assessment for sewerage against cemetery property was valid, although less benefit would be received by this than by other lands. The court said:

> "This court has more than once declared that it does not interfere with the taxation and assessment laws of the states, as violative of the 14th Amendment, unless the state's action has been palpably arbitrary or grossly unequal in its application to the persons concerned. In this case the assessment is a large one, but we are unable to find that the judgment sustaining it has had the effect to deprive the cemetery association of its property without due process of law, or has denied to it the equal pro-

tection of the laws," *Mount St. Mary's Cemetery Asso.* v. *Mullins*, 248 U. S. 506.

In *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, this court quoted, with approval, *Davidson* v. *New Orleans*, 96 U. S. 97, as follows:

> "Neither the coroporate agency by which the work is done, the excessive price which the statute allows therefor * * * nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred * * * are matters in which the state authorities are controlled by the Federal Constitution."

This court announced in *Webster* v. *Fargo*, 181 U. S. 395, that it was not the intention of the court in *Norwood* v. *Baker* to hold that the state taxing power could not create a taxation district and charge the cost thereof in whole or in part against the property in the district, according to valuation, superficial area, or frontage.

In the following Arkansas cases and cases from this court it has been held proper to assess as benefits a certain per cent of the assessed value for state and county purposes, to-wit:

> ***Board*** **v.** *Gas & Electric Company*, 121 Ark. **110.**
> *Ry. Co.* v. *Board of Directors*, 81 Ark. 566.
> ***Alexander*** **v.** *Board*, 97 Ark. 330.
> *Moore* v. *Board*, 98 Ark. 116.
> *Salmon* v. *Board*, 100 Ark. 369.
> *Alcorn* v. *Bliss-Cook Oak Company* (Ark.) 201 S. W. 797.
> *Dorsey Land & Lumber Company* v. *Board*, 136 Ark. 530.

*Webster* v. *Fargo*, 181 U. S. 394.
*L. & N. Ry. Co.* v. *Barber Asphalt Co.*, 197 U. S. 434.
*Wagner* v. *Baltimore*, 239 U. S. 265.
*Houck* v. *Little River Drainage District*, 259 U. S. 294.
*Myles Salt Co.* v. *Board*, 239 U. S. 478.
*Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 176.
*K. C. S. Ry. Co.* v. *Road District*, 256 U. S. 660.

The following quotations are taken from the case of *Branson* v. *Bush*, 251 U. S. 189, to-wit:

> "The subject was carefully re-examined and the law re-stated in cases so recent as *Phillip Wagner* v. *Leser*, 239 U. S. 207; and *Houck* v. *Little River Drainage District*, 239 U. S. 254, with the result that the rule as we have stated it was approved, with the qualification, which was before implied, that the legislative determination can be assailed under the 14th Amendment only where the legislative action is 'arbitrary, wholly unwarranted' a 'flagrant abuse, and by reason of its arbitrary character, a confiscation of particular property.' * * *"
>
> "To this (natural increase in business and the discovery of a large gas field in the territory) must be added the obvious fact that anything that develops the territory which a railroad serves must necessarily be of benefit to it, and that no agency for such development equals that of good roads."

In a recent drainage district case, the Supreme Court of the United States laid down the same proposition in the following language:

> "Since *Houck* v. *Little River Drainage District*, (1915) 239 U. S. 254, the doctrine has been definitely settled, that, in the absence of flagrant abuse or purely arbitrary action, a state may establish drainage districts and tax lands therein for local improvements and that none of such lands may escape liability solely because they will not receive direct benefits," *Miller* v. *Sacramento, etc. Drainage District*, 256 U. S. 130.

The proposition that indirect benefits will accrue to railroad property by reason of increased traffic and that such benefits are sufficient upon which to predicate assessments in improvement district matters is established by the following decisions of the Arkansas court:

*St. Louis & San Francisco Railroad* v. *Bridge District, supra; Oates* v. *Cypress Creek Drainage District, supra;* and the following decisions of this court:

*Branson* v. *Bush, supra.*
*Miller* v. *Drainage District, supra.*

The finding of both the lower courts, from which there has been no appeal by the railroad is that benefits would accrue to the railroad property from the improvement by reason of increased traffic. We, therefore, submit that this case necessarily falls within the enunciation of this court in *Miller* v. *Drainage District, supra*, that none of said railroad property "may escape liability simply because they will not receive direct benefits."

The language of the Supreme Court of Arkansas in *Dorsey Land & Lumber Company* v. *Garland Levee District*, 136 Ark. 524 is appropriate here and we quote as follows:

> "At any rate, the conditions are not such as to justify the court in declaring that the legislative decision involved in the creation of the district and the imposition of the burden of taxation is demonstrably erroneous. To set aside that decision of the law-makers on any other ground would constitute an invasion of the peculiar province of that branch of government."

Appellants contend that it is conclusively shown direct benefits would accrue to the railroad property by making it possible to eliminate a portion, if not all, of a long trestle in the district, thereby increasing the element of safety and likewise calling for a smaller maintenance charge. We submit that a decision to the contrary, in the language of the Arkansas court, merely constitutes "an invasion of the peculiar province of the legislative branch of government." However, since it has been established by decision of both the lower courts that the railroad would be indirectly benefited by reason of increased traffic, in view of the authorities cited, both from this and the Arkansas court, we submit that the situation in which the railroads find themselves has resulted from the application of the state law in the customary manner and on a basis commonly used in improvement districts, and that the inequality, if any, in the assessment, as stated by this court in *Bush* v. *Branson*, *supra*, "is an incidental inequality, resulting from a valid classification of railroad property for taxation purposes, which does not fall within the scope of the 14th Amendment, which 'was not intended to compel the states to adopt an iron rule of equal taxation.'"

It, therefore, is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and remanded with directions to enter judgment for the appellants.

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